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STATEMENT OF THE CASE

Respondents accept petitioner's statement of the case, except for inaccuracies and omissions noted below.

The record shows that the statutory bond was given, and that it was conditioned as required by the statute (Pet. B-2, 3, 5).

The record also shows that respondents made the application and affidavit, and obtained the certified statement of the date of final settlement of the contract, in strict compliance with C.G.S., § 7216 (Pet. E-4 - E-7).

There is no evidence in the record to justify the statement that the Attorney General issued the certified statement of the date of final settlement "without conducting any investigation of the facts" (Pet. p. 5). In the absence of evidence to the contrary, the Attorney General is presumed to have performed his statutory duty, and to have relied upon the information furnished to him by the Highway Department, which was the agency having the contract in charge.

As the record clearly shows, at no time either in the trial court or in the appeal, did petitioner present any question that C.G.S., § 7216 was repugnant to the Constitution of the United States.

ARGUMENT

Point I.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

Rule 19, Supreme Court Rules, 28 U.S.C.A.; 28 U.S.C.A., § 1257 (3);

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 73-74, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

Rule 19, which is not mentioned in the petition, provides in § 1, subsection (a), that a reason for granting review on writ of certiorari is where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

As we shall demonstrate below, the Supreme Court of Connecticut has not decided a federal question at all, much less a federal question of substance.

28 U.S.C.A., § 1257 (3), provides that this Court may review judgments rendered by the highest court of a State in which a decision could be had, by writ of certiorari, where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

As we shall also demonstrate below, the validity of the state statute was at no time drawn in question on the ground of its being repugnant to the Constitution of the United States, and petitioner never claimed any right under the Constitution of the United States, either in the trial court or on the appeal.

In *Rice v. Sioux City Memorial Park Cemetery, supra,* this Court lays at rest all of petitioner's arguments for review. In discussing Rule 19 and the considerations governing review on certiorari, this Court said:

> "A federal question raised by petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. (Magnum Import Co. v. Coty, 262 U.S. 159, 163; see also Address of Mr. Chief Justice Vinson, before the American Bar Association, Sept. 7, 1949, 69 S. Ct., v, vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc. Am. Law Inst. 313) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Petitioner states only that it invokes the jurisdiction of this Court under 28 U.S.C.A., § 1257 (3), but it has not stated any of the grounds prescribed by § 1257 (3) on which this Court may review the final judgment of the Supreme Court of Connecticut by writ of certiorari.

Point II.

Petitioner's five-page statement of "Reasons for Granting Writ" is simply a statement of the reasons why petitioner thinks the case was wrongly decided by the Supreme Court of Connecticut. This Court has no power to revise judgments of state courts on questions of state law.

Hamblin v. Western Land Co., 147 U.S. 531, 13 S. Ct. 353, 37 L. Ed. 267 (1893);

Thomas v. Iowa, 209 U.S. 258, 28 S. Ct. 487, 488, 52 L. Ed. 782 (1908);

Preston v. Chicago, 226 U.S. 447, 33 S. Ct. 177, 57 L. Ed. 293 (1913);

Scripto v. Carson, 362 U.S. 207, 210, 80 S. Ct. 619, 4 L. Ed. 2d 660 (1960);

Henry v. State of Mississippi, 379 U.S. 443, 446-447, 85 S. Ct. 564, 567, 13 L. Ed. 2d 408 (1965).

Argument of the type made by petitioner in its statement of "Reasons for Granting Writ", standing alone, is seldom persuasive to the exercise of this Court's certiorari jurisdiction. See Mr. Justice Harlan, *Manning the Dikes*, 13 Record of N.Y.C.B.A. 541, 551 (1958).

Point III.

Before this Court will review a decision of a state court, it must affirmatively appear from the record, not only that a federal question was presented to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to its jurisdiction of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

Lynch v. New York, 293 U.S. 52, 54, 55 S. Ct. 16, 17, 79 L. Ed. 191 (1934);

Honeyman v. Hanan, 300 U.S. 14, 18, 57 S. Ct. 350, 352, 81 L. Ed. 476 (1937).

Where the judgment of the state court might rest on two grounds, one involving a federal question, and the other a state ground, and if the state ground is sufficient to sustain the judgment, this Court will not take jurisdiction to review that judgment.

Klinger v. State of Missouri, 13 Wall. 257, 263, 20 L. Ed. 635, 637 (1872);

Wood Mowing & Reaping Machine Co. v. Skinner, 139 U.S. 293, 297, 11 S. Ct. 528, 35 L. Ed. 193 (1891);

Allen v. Arguimbau, 198 U.S. 149, 154-155, 25 S. Ct. 622, 49 L. Ed. 990 (1905);

Lynch v. New York, 293 U.S. 52, 55 S. Ct. 16, 79 L. Ed. 191 (1934);

Dorley v. Mayo, 351 U.S. 277, 281, 76 S. Ct. 806, 100 L. Ed. 1178 (1956), rhg. denied, 352 U.S. 859, 77 S. Ct. 22 (1956).

Although petitioner asserted a claim of due process of law in the trial court pleadings (Pet. F-1, 2), it was not pressed in the trial court, for the trial court's opinion does not mention it (Pet. B-1-5)

It was not an issue presented to the Supreme Court of Connecticut, for the court's rule requires the appellant's brief to contain "a concise statement setting forth without detail or discussion the principal issue or issues involved in the appeal." Connecticut Practice Book, § 713. It was not stated as an issue involved in the appeal as shown by the "Statement of Issues" in petitioner's brief for the Supreme Court of Connecticut (Pet. F-5). Petitioner's brief makes only a passing reference to "due process" (Pet. F-6).

There is no mention of any federal question or any constitutional right in the decision of the Supreme Court of Connecticut. A federal question which the highest state court is, by its settled practice, justified in disregarding, either because not assigned or because not noticed or relied upon in the brief or argument of counsel, will not survive as a basis for review by this Court. *Hulbert v. Chicago*, 202 U.S. 275, 26 S. Ct. 617, 50 L. Ed. 1026 (1906); *United States Fidelity & Guaranty Co. v. Oklahoma*, 250 U.S. 111, 39 S. Ct. 399, 63 L. Ed. 876 (1919).

Point IV.

This Court will not take jurisdiction to review a federal question which was not properly raised before the trial court, and pursued on appeal to the highest state court, as provided by state procedure. *Beck v. Washington*, 369 U.S.

541, 549-554, 82 S. Ct. 955, 959-962, 8 L. Ed. 2d 98 (1962). Having raised and abandoned its Fourteenth Amendment claim to due process, petitioner cannot now revive it. *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, 313, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968), n. 6, as explained in Mr. Justice Harlan's dissent, at pages 333-336, 88 S. Ct., at pages 1616-1618.

Point V.

The question involved in this case has become academic and moot, and this Court will not review questions which have become moot.

> *United States v. Alaska S.S. Co.*, 253 U.S. 113, 40 S. Ct. 448, 64 L. Ed. 808 (1919);
>
> *Berry v. Davis*, 242 U.S. 468, 37 S. Ct. 208, 61 L. Ed. 441 (1917);
>
> *Natural Milk Producers Assn. v. San Francisco*, 317 U.S. 423, 63 S. Ct. 359, 87 L. Ed. 375 (1942);
>
> *Doremus v. Board of Education*, 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952).

The Connecticut Statute involved in this case has been amended to eliminate the "date of final settlement of the contract" as starting the period of limitation for bringing action on the bond, and to limit the time for bringing action to one year from the date of furnishing the last of the labor or furnishing the last of the material, by 1969 Public Act 192, §§ 1, 2, which amendment coincides with an amendment to the Miller Act., 40 U.S.C. §§ 270b (b), 270c, in 1959.

Except for the parties to this action, there would be no precedental value in a decision by this Court. This Court does not sit to satisfy an academic interest in certain issues. Nor does it sit for the benefit of particular litigants.

See *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 99 L. Ed. 897 (1955).

Point VI.

Although there is federal precedent for the Attorney General to alter or amend his original determination of the date of final settlement of the contract, as the Comptroller General did, in *United States Fidelity & Guaranty Co. v. Hendry Corporation*, 391 F. 2d 13, 15 (5th Cir. 1968), certiorari denied, 393 U.S. 978, 89 S. Ct. 446, 21 L. Ed. 2d 439, the record in this case is barren of any evidence that petitioner asked for a hearing before the Attorney General, or tried in any way to have him change his original certified statement of the date of final settlement of the contract. Therefore, petitioner has failed to exhaust its administrative remedies, which is another reason why this Court will not review the decision of the Supreme Court of Connecticut.

Point VII.

There is no Fourteenth Amendment requirement for a hearing before the government makes up its mind what it owes on a contract. "What in fact it is required to pay is not in question in establishing a final settlement" (Opinion of Supreme Court of Connecticut, Pet. C-8). Respondents applied for, and obtained from the Attorney General, a certified date of final settlement of the contract *ex parte*, in precisely the manner contemplated by the statute, which authorized an administrative officer to conclusively determine a specific fact, without requiring either notice or hearing. C.G.S., § 7216, Rev. 1949, § 49-43, Rev. 1958. The statute does not call for the exercise of any quasi-judicial function.

In certifying the date of final settlement of the contract, the Attorney General, by federal analogy, performed an

administrative act within his absolute, unreviewable discretion.

United States Fidelity & Guaranty Co. v. Hendry Corporation, 391 F. 2d 13, 15 (5th Cir. 1968), certiorari denied, 393 U.S. 978, 89 S. Ct. 446, 21 L. Ed. 439;

Peerless Casualty Co. v. United States, 241 F. 2d 811 (1st Cir. 1957).

CONCLUSION

Petitioner has failed to show more than a private dispute between private parties with respect to a statutory right of action under State law. It has not established any grounds for review by writ of certiorari, either under Supreme Court Rule 19, or 28 U.S.C.A., § 1257 (3), and the petition should be denied.

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CERTIFICATE OF SERVICE

I, Elmer W. Beasley, counsel for The Ætna Casualty & Surety Company, American Employers' Insurance Company, and Employers' Fire Insurance Company, respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of December, 1972, I served three copies of the foregoing brief for respondents in opposition to the petition for a writ of certiorari upon petitioner, by depositing three copies of said brief in the United States mail, first class, postage prepaid, to petitioner's counsel, Francis J. McNamara, Jr., Cummings & Lockwood, One Atlantic Street, Stamford, Connecticut, 06904.

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